INDEX

CITATIONS

587202—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 934

THE EMPORIUM CAPWELL COMPANY, A CORPORATION, PETITIONER

v.

CLIFFORD C. ANGLIM, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 77–84) is reported at 48 F. Supp. 292. The opinion of the Circuit Court of Appeals (R. 103–111) is reported at 140 F. 2d 224.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 24, 1944 (R. 112). A petition for rehearing was denied on March 1, 1944 (R. 113). The petition for a writ of certiorari

was filed April 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a Delaware corporation, owning all the common stock of taxpayer, entered into a merger agreement with taxpayer, whereby taxpayer became the continuing corporation and where the Delaware corporation surrendered its certificate of stock to a transfer agent of taxpayer, and taxpayer thereupon issued to Delaware's stockholders its stock in the same number of shares each stockholder held in Delaware, did taxpayer incur liability for documentary stamp taxes within the meaning of Section 1802 (b) of the Internal Revenue Code on the transfer of the stock from Delaware to its stockholders?

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 11–15.

STATEMENT

On September 20, 1939, taxpayer, a California corporation, and the Emporium Capwell Corporation, a Delaware corporation, entered into an agreement of merger as prescribed and provided by the laws of California and Delaware, respectively (R. 3, 69). The agreement provided that the two companies should merge into a single corporation. Taxpayer, the surviving corpora-

tion, would continue to exist under the merger and be governed by the laws of California. The terms and provisions of its amended articles of incorporation, then in force, including the number of shares of stock which the corporation was authorized to issue, would remain unchanged by the merger. (R. 11–12.) The agreement states (R. 12–15):

> (4) The terms and conditions of such merger shall be as follows:
>
> (a) The issued capital stock of The Emporium Capwell Corporation presently consists of 420,000 shares without par value, of which 7,147 shares are owned by The Emporium Capwell Corporation itself and held in its treasury, and the remaining 412,853 shares are outstanding in the hands of holders other than The Emporium Capwell Corporation. Such merger shall operate to extinguish all the issued capital stock of The Emporium Capwell Corporation. The 412,853 shares of such stock held by holders other than The Emporium Capwell Corporation shall, by such merger, be extinguished, and such merger shall effect the transfer, from The Emporium Capwell Corporation to the holders of the said 412,853 shares of its capital stock proportionately, of all the issued and outstanding common stock of The Emporium Capwell Company, being 412,853 shares without par value, all presently held by The Emporium Capwell Corporation. Accordingly, the

holders of shares of the capital stock of The Emporium Capwell Corporation (other than The Emporium Capwell Corporation itself) shall receive one share of the common stock of The Emporium Capwell Company in exchange for each share of such capital stock of The Emporium Capwell Corporation extinguished as aforesaid. The 7,147 shares of the capital stock of The Emporium Capwell Corporation held by The Emporium Capwell Corporation in its treasury shall, by such merger, be extinguished without the issuance or transfer to the holder thereof of any other shares of stock in exchange therefor;

* * * * *

(5) The mode of carrying the terms and provisions of the merger into effect, and the manner and basis of converting the shares, and rights to purchase shares, of The Emporium Capwell Corporation into shares, and rights to purchase shares, of The Emporium Capwell Company, shall be as follows:

(a) After the merger herein provided for shall have become effective, the outstanding shares of the capital stock of The Emporium Capwell Corporation will, by the terms of such merger hereinabove set forth, have been extinguished, and each of the holders of record of such shares (other than The Emporium Capwell Corporation itself) will, by the terms of such merger, have become the owner of a like

number of shares of the common stock of The Emporium Capwell Company, transferred to such holder from The Emporium Capwell Corporation. The Emporium Capwell Company, surviving corporation, will cause the certificate or certificates representing the 7,147 shares of the capital stock of The Emporium Capwell Corporation formerly held in the treasury of the latter to be cancelled, and will direct all other holders of record of the capital stock of The Emporium Capwell Corporation (except such holders as shall have and shall exercise the right to demand payment for such shares under the laws of the State of Delaware) to surrender their certificates of such capital stock to the surviving corporation or to The Bank of California, National Association, Transfer Agent for the common stock of The Emporium Capwell Company, in order to receive certificates evidencing the ownership of a like number of the shares of the common stock of The Emporium Capwell Company; and upon such surrender of any such certificate of such capital stock, The Emporium Capwell Company will execute and its said Transfer Agent will cause to be delivered to the record holder thereof in exchange therefor, a certificate evidencing the ownership of a like number of shares of the common stock of The Emporium Capwell Company, all as a part of the merger herein provided for;

* * * * *

The Delaware corporation owned all of the taxpayer's common stock, the value of which was $8,511,808.03. The only other asset of Delaware was cash in the amount of $6,769.88. It owed accounts and taxes in the amount of $9,395.41. (R. 86.) Delaware owned 7,147 shares of its own stock and its remaining 412,853 shares were held by the general public. The common stock of taxpayer was evidenced by one stock certificate for 412,853 shares. (R. 86.)

The agreement for merger and the accompanying documents were filed in the office of the Secretary of State of Delaware on January 31, 1940 (R. 87). Upon consummation of the merger agreement Delaware endorsed the stock certificate in blank and delivered it to the transfer agent of the taxpayer (R. 86). The certificate was then canceled by the agent and new certificates for shares of common stock of taxpayer were issued and distributed to Delaware's stockholders in proportion to the number of shares which each such stockholder owned in Delaware. The Delaware stockholders surrendered their old certificates when the new certificates for taxpayer's stock were received. (R. 86–87.) A letter was written by Delaware to taxpayer's transfer agent stating that the stock certificate was surrendered in order that the transfer of the stock from Delaware to its stockholders might be made on taxpayer's books (R. 75–76).

On June 10, 1941, the Commissioner of Internal Revenue assessed documentary stamp taxes against taxpayer for $16,514.12 upon the transfer of taxpayer's shares from Delaware to Delaware's stockholders (R. 72, 87). Taxpayer paid these taxes on June 14, 1941 (R. 87), and filed claim for refund on July 2, 1941 (R. 73). On November 12, 1941, the Commissioner rejected the claim for refund (R. 73). Recovery was denied by the District Court (R. 89), and the Circuit Court affirmed (R. 111).

ARGUMENT

The court below correctly held that the transfer of the stock owned by the merged corporation to its own stockholders was subject to the stamp tax imposed by Section 1800 of the Internal Revenue Code (Appendix, *infra*, p. 11). The broad scope of this statute was recognized by this Court in *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, 62–63, and in *Founders General Co.* v. *Hoey,* 300 U. S. 268, 275. It is settled that every transfer of stock is within the reach of the tax, unless specifically excluded.

The recent case of *United States* v. *Seattle-First Nat. Bank,* No. 267, present Term, decided March 27, 1944, not yet reported, dealt with an exclusion which was authorized by Treasury regulations, but which is not applicable here.

This Court's opinion was grounded upon the proposition that the federal act under which the

consolidation was effected provided that, upon performance of the statutory requisites for a consolidation, the assets of the constituent corporations were deemed vested automatically in the consolidated corporation by virtue of the consolidation and without any deed or other instrument of transfer. This Court there said:

> We must look only to the immediate mechanism by which the transfer is made effective. If that mechanism is entirely statutory, effecting an automatic transfer without any voluntary action by the parties, then the transfer may truly be said to be "wholly by operation of law."
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> * * * * *
>
> Thus it is the National Banking Act that is the mechanism by which the transfer of securities is made effective. No voluntary act by the parties is necessary. It follows that the transfer occurred "wholly by operation of law."

Here there is no statute which provides that the transfer to the stockholders shall occur by operation of law and it seems clear that the case is not within the scope of the regulation as interpreted by this Court. The *Seattle-First Nat. Bank* case involved a transfer of assets of a state bank to the consolidated company, which became entitled to the assets under the statute without the necessity of a transfer. The comparable transaction here was the transfer of the assets

of Delaware to the taxpayer. But that is not the taxable transaction. The tax was imposed upon a transfer to the stockholders of Delaware. As there was no statutory provision for vesting title to the stock in them individually, the taxable transfer was occasioned by the voluntary acts of the parties. The court below similarly distinguished its own earlier decision in the *Seattle-First Nat. Bank* case (R. 111).

Taxpayer further asserts that the transfer is excluded from the tax under the provisions of Treasury Regulations 71, Article 35 (e) (Appendix, *infra,* p. 14), which reads as follows:

> The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger, and the substitution of new certificates for the certificates representing the old stock of the merging corporation.

Taxpayer contends that the court below erred in treating it as the "merging" corporation rather than the "merged" corporation. The point is of no consequence since in either event no *stock of Delaware* was involved in the taxable transfer. Applying the regulation in the manner contended for by taxpayer, it refers to a transfer of the stock of taxpayer in exchange for the *stock of Delaware.* What Delaware transferred was the stock of taxpayer which it owned. Taxpayer thus contends that the stock in Delaware's port-

folio is *stock of Delaware.* This is obviously not the meaning of the regulation since investment stock is elsewhere referred to in the regulations as "stock owned by a corporation." See Article 34 (r), Appendix, *infra,* pp. 13–14. In any event, no conflict is asserted with respect to this point.

CONCLUSION

There is no conflict of authorities. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1944.